Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Implementation of the Cable Television Consumer Protection and Competition Act of 1992 | ) | CS Docket No. 98-82 |
| | ) | |
| Review of the Commission's Cable Attribution Rules | ) | |

To: The Commission

# COMMENTS OF CONSUMERS UNION, *ET AL.*

Consumers Union, Consumer Federation of America, the Center for Media Education, the Office of Communication, Inc. of the United Church of Christ and the Association of Independent Video and Filmmakers ("CU, *et. al.*") respectfully submit these comments in response to the FCC's June 26, 1998 *Notice of Proposed Rulemaking* ("*NPRM*") in this docket. The Commission asks whether it should revise its cable attribution rules, with particular emphasis on whether it should depart from the approach employed in its closely-related broadcast attribution rules.

Citizens groups have repeatedly expressed dissatisfaction with the Commission's loophole-ridden broadcast attribution policies. The FCC's failure to apply aggressive and effective oversight to its ownership policies undermines the all-important goals of diversity and competition. Lax policies, especially in broadcast ownership, have undermined confidence in the integrity of the FCC's processes. Industry increasingly sees the Commission's rules as obstacles that smart counsel can -- and should -- evade.[1] This unfortunate trend should not be extended to cable.

[1] *Broadcasting and Cable* has editorialized that "As Sinclair [Broadcast Group] discovered long ago, an enterprising broadcast company can circumvent the FCC prohibition against owning two stations by simply contracting to manage the second.****The reality of the marketplace is that there already is de facto duopoly...." "Strength in numbers," *Broadcasting and Cable,* March

FCC staff and other interested parties obligated to read these comments will be relieved to know that CU, *et al.* see no reason to repeat these arguments yet again. For immediate purposes, it is sufficient to endorse in general the introductory material set forth by Media Access Project, *et al.* in response to the *FNPRM* in MM Dockets 94-150, 92-51 and 87-154, pp. 2-7, and the *Second FNPRM* in MM Dockets 91-221 and 87-7. Both were filed on February 7, 1997.

The 1997 comments filed in MM Dockets 94-150, 92-51 and 87-154 characterize attribution as "the foundation upon which multiple and cross-ownership rules are built." *Comments* at 3. The comments oppose liberalization of existing ownership rules until sufficient time has passed to assess the impact of changes required by the 1996 Telecommunications Act and urge that in adopting policies, the emphasis must be placed upon viewpoint diversity, not the mere number of outlets in the marketplace. *Id.* The 1997 filings also challenge the propriety of "LMAs" and similar contractual arrangements that attempt to evade or circumvent ownership rules. These practices undermine effectiveness of the Commission's rules, and must be addressed with clear and stringent rules which emphasize function over form. Bright-line rules, such as the "debt plus equity" proposal under consideration here, may also be needed.

The central question in this inquiry is whether the Commission should depart from its current practice of applying more stringent attribution standards to cable under certain circumstances. CU, *et al.*'s answer is unequivocal: no.

At the outset, it is important to reiterate that, for the reasons CU, *et al.* have explained in the numerous broadcast dockets, current broadcast attribution policies are inadequate. If there were any reason to regard broadcasting and cable as having become so directly competitive that

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2, 1998, p. 62.

ownership policies must be entirely harmonized, the proper action would be to stiffen the definition of broadcast ownership, as CU, *et al.* have urged, not to ease cable rules.

There is no reason to equate cable and broadcasting here. Cable is, for all practical purposes, a monopoly in providing MVPD offerings. This is significantly different from broadcasting, which is, for the time being, "merely" a local oligopoly engaged in providing free, single-channel service ("monocasting"). Large MSOs and cable programmers need little or no direct ownership in a cable system to be able to benefit from imposing powerful pressure on local competitors. As has been repeatedly demonstrated, the distinction between cable owners and broadcast licensees remains an important one, and the powers that come with the cable monopoly justifies the application of stringent ownership standards. Recent experience in program access cases, such as denying important programming to cable's competitors by abusing powers gained through retransmission consent and other contractual relationships, underscores the fact that direct ownership is not essential to exercise power over programming markets. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1149-1151 (1998).

Ownership structures in the cable industry strongly justify stringent attribution rules. Many smaller MSOs and many individual cable systems are structured as partnerships, which are often devised to obtain favorable tax treatment. Partners holding nominally minimal ownership typically protect their interests by creating options, put-sell provisions, rights of refusal and other arrangements which have been subject to abuse and exploitation in the broadcast context. *See, e.g., Fenwick Island Broadcast Corp.*, MM Docket 87-236 (1990) (debtholder entitled to 50% premium on payback, secured by option to purchase station outright). At the corporate level, larger cable MSOs have constantly changed form by means of seemingly endless stock-for-stock acquisitions, subsequent spin-offs, creation of "tracking" stock, and other devices. Here, too, change in control may or not change with modifications in the form of ownership.

Experience and sound telecommunications policy support the view that "insulated" limited partners can, in practice, exercise far more suasion than would otherwise seem possible. Unlike broadcasting, where the FCC has annual ownership reporting requirements and reviews periodic license renewal applications, cable franchises are administered locally. Provisions relating to the right to fire or hire management when certain debt thresholds are exceeded, or if certain performance benchmarks are not attained, are far too complex for the agency to parse, especially where there is no ongoing FCC scrutiny. Far from examining ownership, the Commission -- without authorization or public announcement -- actually stopped collecting important cable ownership data. *Annual Report of Cable Television System, Form 325, Filed Pursuant to Section 76.403 of the Commission's Rules*, FCC No. 98-79 at ¶5 (rel. April 30, 1998).

CU, *et al.* generally support the Commission's adoption of an "equity or debt plus" test as an additional factor in defining attribution. However, they absolutely do not support this test as a substitute for existing attribution policies. For reasons explained in the February 7, 1997 comments in Docket 94-150, at 16-20, CU, *et al.* believe that such a rule can be circumvented by structuring investments that fall just short of the separate threshold percentages for debt ***and*** equity. To address this circumstance, CU, *et al.* suggest that -- in addition to looking at aggregated equity, debt and total capitalization individually -- the Commission also look at them together. Thus, if an entity holds interests in any two of those categories that equals two-thirds of whatever threshold percentage the Commission sets for an "equity or debt plus" limit, the party's interest would be deemed attributable. *Id.* at 17-18.

Finally, CU, *et al.* strongly oppose application of the single majority shareholder exemption to cable ownership. As the preceding discussion shows, not all passive owners are equally passive. *Cleveland Television Corp. v. FCC*, 732 F.2d 962, 971 (D.C. Cir. 1984). Vertically integrated cable programmers, in particular, can use their assets to force business practices on supposedly dominant partners or shareholders.

## CONCLUSION

The Commission can use this proceeding to make its regulations mean what they say, or it can use it to create opportunities to "game" the system. If ownership levels are to be raised or lowered, the Commission can and should do so openly and without artifice. It should not seek to avoid the issue by tolerating devices for evasion.

Respectfully submitted,

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